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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 786

EDWARD M. WINSTON,
Petitioner,

vs.

THOMAS J. COURTNEY, State's Attorney, COUNTY OF COOK, a Municipal Corporation of the State of Illinois, and others,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

There heard on appeal from the Circuit Court of Cook County.

PETITION FOR REHEARING UPON AMENDED PETITION FOR WRIT OF CERTIORARI.

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Your order denying certiorari April 24, 1944.

We are advised by the Clerk of this Court that the order denying the petition for writ of certiorari reads as follows:

"The petition for writ of certiorari is denied for failure to comply with paragraphs 1 and 2 of Rule 38 and paragraph 1 of Rule 12. Mr. Justice Rutledge

took no part in the consideration or decision of this application."

Counsel for petition express regret to have been informal in making the application. They hope by this petition for rehearing to comply with all applicable rules of Court.

Your petitioner, Edward M. Winston, prays for a rehearing and a reversal of order April 24, 1944; and that Writ of Certiorari be issued by this Court to review the judgment below of the Supreme Court of Illinois, finally rendered November 11, 1943, affirming a judgment against your petitioner entered by the Circuit Court of Cook County of Illinois, dismissing his answer and counterclaim.

Judgment and Opinion Below.

The opinion of the Supreme Court of Illinois was first filed September 23, 1943. A Petition for Rehearing on the part of your petitioner was duly filed, but was denied by that court November 11, 1943. (Tr. 159.) Another, and separate, Petition for Rehearing (Tr. 100) was duly filed by certain other defendants below (individual members of Cook County Board of Commissioners), but that Petition was "stricken," November 10, 1943, without any reason being given therefor. See detail of record at page 5ff below.

One complete record here.

The opinions by the Supreme Court of Illinois in this case, make reference to some records of other cases which were decided at the same time. That fact does not make those cases of any importance upon this review. The court records of those cases were and remain separate and distinct at all times. They have not been brought here. What-

ever was said about those cases is not pertinent. The record in case 27169 is the only one brought here from the Supreme Court of Illinois. That record is complete and unabridged for this review.

Winston contract of record.

The opinions by the Supreme Court of Illinois are reported as follows: 358 Ill. 146 and 384 Ill. 287.

The judgment of Illinois courts held as invalid and of no avail a formal record contract (Tr. 10) for legal services, between your petitioner, an attorney at law, and the County of Cook, State of Illinois. Both courts thereby denied all rights of your petitioner under the said contract and held adversely to your petitioner (Tr. 49, 79, and 159) upon certain Federal questions, based on the Constitution of the United States and hereinafter more fully set forth.

Federal Questions.

The major Federal questions in this case are:

A. Whether a written contract made by a County upon its public records in good faith, by authority of specific and County legislation, between a practicing attorney and the County, providing for fees and reimbursement to the attorney for legal services and expenses paid out by him in rendering legal services in the courts for the collection of taxes on real estate, is valid and enforceable, and is protected from impairment by the Constitution of the United States. :

B. Whether destruction by a State Court of such a contract is not forbidden by those provisions of the Constitution of the United States which prohibit impairments of contracts; which prohibit *ex post facto* laws and decisions of States; which prohibit the taking of vested and estab-

lished contract rights or other private property; which prohibit the taking of private property for public use, and which prohibit a State from denying to the citizen the equal protection of the law, on any grounds whatever.

C. Whether the license and franchise held by Winston for over fifty years to practice law and thereby earn a livelihood for himself and family, may be substantially changed in scope by sudden decision by Supreme Court of Illinois in 1943 to reverse the established law of Illinois whereunder private attorneys had been employed by counties for all manner of civil and tax litigation, pursuant to definite authority shown since 1870 by the Constitution as to Cook County, and by many decisions of Illinois Courts discussed below at page 36ff

The foregoing Federal questions are of such general public importance, and are particularly of such grave personal importance to your petitioner, that they should be reviewed by this Court. Particularly is that so because the said rulings made by the courts of Illinois on this record seem to be in clear conflict with decisions and rulings previously made by this Court.

Winston has not claimed and does not claim to supersede any power of the State's Attorney of Cook County. His services were rendered pursuant to legislation by the County Board and pursuant to request by John A. Swanson, State's Attorney, and pursuant to contract made of public record with the County Board. Winston agrees that the County Board had authority to terminate his authority to render further services by new legislation by the County Board, which was done by County Board proceedings dated January 16, 1933.

Statement of the Case by Pleadings

Information in equity.

The contract between Winston and Cook County was placed of record April 16th 1932 (Tr. 8) and was confirmed and extended by acts of record November 22, 1932 (Tr. 10). There was full performance by Winston under this contract until this suit was begun.

At an election held in November 1932, Thomas J. Courtney was elected as State's Attorney for Cook County, Illinois. In December 1932 (as successor to John A. Swanson) he entered upon the duties of that office. An Information in the nature of a bill in equity for injunction was filed July 22, 1933, by "Thomas J. Courtney as State's Attorney for the said County of Cook for the people of the State of Illinois, and in the name and by authority thereof, and on the relation of himself as a resident and taxpayer of said County of Cook in behalf of himself as such taxpayer and other taxpayers of said County similarly situated." (Tr. 1.) An amended Information and thereafter a second amended Information were filed (Tr. 2-16). Winston and all members of the County Board, defendants named in said Informations, filed demurrers which were sustained by the Circuit Court by order entered December 15, 1933 (Tr. 21-22). The State's Attorney elected to stand upon said amended Information and thereupon the same was dismissed (Tr. 22).

By opinion on the first appeal (*People ex rel Courtney* v. *Ashton,* 358 Ill. 146, 148) that Supreme Court stated the substance of the Information as follows:

> "The people of the State of Illinois, on the relation of Thomas J. Courtney, State's Attorney of Cook County, and on his relation individually as a resident

and taxpayer of that County, filed in the Circuit Court of Cook County two Informations against the members of the Board of Commissioners of Cook County, the County Treasurer, the County Clerk, and certain attorneys therein named, as defendants, seeking to enjoin the payment to the attorneys of county funds under alleged contracts entered into between the County Board and those attorneys.

* * * * * *

"The Informations averred that Courtney is the State's Attorney of Cook County, and that on the 22nd day of May, 1931, and on June 6, 1932, the Board of Commissioners, without power or authority, went through the form of passing resolutions which are set out in the Information, attempting in case No. 22412 to employ Henry M. Ashton and others to prosecute suits and collect delinquent real estate taxes and to authorize him to appear on behalf of and represent the people of the State and the County of Cook as attorney and solicitor,and fixed his compensation on a contingent basis. By amendment Edward M. Winston was substituted for Ashton. * * * The Informations allege that these contracts were *ultra vires* the power of the board and null and void. * * *

And that Supreme Court stated the defense as follows:

"The defendants (Ashton-Winston-and all members of the County Board) filed a general and special demurrer to each of the Informations, which demurrers were sustained, and, plaintiff in error abiding the Informations, they were dismissed." (P. 149.)

On that appeal the cause was reversed by Supreme Court of Illinois, in the case of *People* v. *Ashton,* Cause 24212, and remanded to the Circuit Court of Cook County, with directions to overrule said demurrer (Tr. 22). Thereafter Thomas J. Courtney on April 19, 1935 filed his amendment and supplement to the aforesaid amended Information (Tr. 22-25).

Challenge by State's Attorney to Winston Contract.

By said various Informations Thomas J. Courtney as said informant sought to have declared *ultra vires,* certain agreements incorporated in Legislation adopted by said County Board, employing said Ashton and said Winston as attorneys and counsellor-at-law, to prepare and file and prosecute before the Circuit and Superior Courts of Cook County, civil suits and proceedings to collect delinquent taxes, interest and penalties due on real estate in Cook County.

Winston filed his amended answer and counterclaim to said Information so amended and supplemented, and informant Courtney filed his motion to strike said answer and counterclaim on October 9, 1942 (Tr. 46-48). That motion was sustained by the Circuit Court of Cook County, and a decree entered that said Winston abided his said answer and counterclaim, and reciting "that defendant Winston take nothing by his suit and that the defendant go without day" (Tr. 49.)

Amended Answer and Counterclaim by Winston.

Winston by his pleading (Tr. 63 to 73), denies that said acts of the County Commissioners were *ultra vires* the power of the Board, and denies that the contracts for his legal services are null and void, and denies that at the time of the acts referred to no appropriation therefor was previously made, but on the contrary avers that there were a number of appropriations made by the County Board during the first quarter of the then fiscal year which were applicable to the contracts with Ashton and Winston and that said contracts were made with full power and authority of law.

The amended answer and the counterclaim proceed to challenge the Information and its language in detail not material to this review (Tr. 63-70) and shows that the action by the County Board was in due course of county business; become urgent under the stress of depression years and "tax payers strike."

The amended answer and counterclaim further avers (Tr. 70, 71) that pursuant to the said contracts, Winston in good faith put in many months of arduous professional legal labors both on the part of himself and of others under his supervision and to whom he is liable and expended large amounts of money and filed 818 suits for the collection of such delinquent taxes, penalties, costs and for the foreclosure of liens for such delinquent taxes and paid to the County moneys so collected or caused to be collected, aggregating more than Sixteen Million Dollars (358 Ill. 149). That there is due him for his services rendered under the contracts substantial compensation. (Tr. 71.)

Amended answer and counterclaim further aver (Tr. 71) that the County received the benefit of said labors and expenditures by Winston and that the County of Cook and the Board of Commissioners and said Thomas J. Courtney are and each of them is and should be estopped from asserting or claiming that the contracts were or are invalid or that he, Winston, is not entitled to receive consideration therefor.

Amended answer and counterclaim further avers (Tr. 72) that before entering into the contracts the members of the County Board took counsel with Hayden Bell, who was then County Attorney for Cook County, with John A. Swanson who was then State's Attorney, and with the Honorable Denis E. Sullivan, who was then one of the

Judges of the Superior Court of Cook County. That each of them advised the County Board that the contracts were valid and legal and proper. That the County Board acted upon such legal advice in entering into the contracts with Ashton and Winston.

Amended answer and counterclaim further avers (Tr. 72) that on the 13th day of June, 1939, the County Board and Winston entered into an accounting whereby a definite sum was found as the balance due him. That such accounting constituted an account stated. That Winston demands payment for the same, with legal interest thereon.

Amended answer and counterclaim (Tr. 50 to 54) invokes particularly Section 7 of Article X of the Constitution of the State of Illinois, which makes it the duty of the County Board to manage the county affairs. And it invokes sundry statutes of Illinois. Some of them are quoted below at the Appendix beginning on page 52. See also page 24.

Amended answer and counterclaim further avers (Abst. 56, 57) that in the numerous cases which Ashton and Winston commenced and prosecuted, the same were pending for sufficient lengths of time for the court in each case to take and have knowledge that the proceedings were conducted for and on behalf of the County by Ashton and Winston respectively; by permitting, sanctioning and approving the acts in such cases of Ashton and Winston, respectively, while the same were so pending the court in such numerous cases in each instance by such acquiescence in effect appointed Ashton and Winston, respectively, as a competent attorney to prosecute such causes and proceedings, and the County and the County Board and the State's Attorney of Cook County then and now were and are estopped from setting up a claim that Ashton and Winston, respectively,

were not properly and lawfully acting as such attorney with the same power and authority in relation to such causes or proceedings as the Attorney General or State's Attorney would have had if present and attending to the same; that because of the inability and unwillingness of the then State's Attorney of Cook County it became and was the power and the duty of the County Board and of the County of Cook to provide and arrange to collect unpaid taxes as in and by the contracts with Ashton and Winston provided and authorized.

The fact allegations set forth by the amended answer and counterclaim of Winston (being admitted as true by the State's Attorney motion to strike) constitute the factual background of this case (Tr. 63-73).

How the Issues were Decided.

On October 23, 1942 the Circuit Court of Cook County sustained the motion of the State's Attorney to strike Winston's amended answer and counterclaim, and found as matter of law that the contracts are void; for the reason asserted that the County Board had no power or authority to contract with Ashton or Winston to perform the legal services, as set forth in the aforesaid resolutions adopted by said Board of Commissioners; on the ground that the sole and exclusive power to commence and prosecute suits and proceedings for the recovery of delinquent taxes and interest and penalties, is vested in the State's Attorney of Cook County. The decree further dismissed the counterclaim filed by Winston and ordered that the County of Cook go hence without day (Tr. 49). That decree was affirmed by the Supreme Court of Illinois and rehearing denied November 11, 1943. All those orders form the matter brought here for review and rveersal (Tr. 159-160).

In the Supreme Court of Illinois, these Errors Were Relied Upon for a Reversal of the Order and Decree of the Trial Court.

(a) The court acted contrary to Statute and the Constitution and prior decisions as herein stated, in not sustaining the validity of the contracts here involved, and erred by ordering and decreeing that said answer by Winston be stricken and that his counterclaim be dismissed.

(b) The trial court acted contrary to Statute and the Constitution and prior decisions as hereinstated, in holding that the contracts and undertakings set forth in the legislation adopted by the Board of Commissioners of Cook County were *ultra vires* and beyond the power of said County Board.

(c) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in holding that the County of Cook was not liable for the services rendered and those moneys expended by Winston, in performing his contract and agreement with said County Board of Commissioners.

(d) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in not holding that the County of Cook was estopped, after receiving the benefit of the services rendered and the money expended by Winston in the performance of said contracts from refusing to pay for such services and moneys so expended upon its order and request.

That opinion by the Supreme Court of Illinois, which was filed on September 23, 1943, in support of the judgment order now here under review, expressly names and repudiates its own prior decisions and interpretations of the Con-

stitution and Statutes of Illinois (384 Ill. page 300). Upon those solemn decisions your petitioner and Cook County had acted and performed under contract. Those prior decisions and interpretations will be mentioned in this petition, and are discussed at page 36ff.

Statement as to Jurisdiction in this Court.

The assignment of errors in the record and briefs filed before the Supreme Court of Illinois, and the petitions for rehearing in that Court (tr. 81-158) summarize the Constitutional and Federal questions presented to that Court and to the Circuit Court of Cook County. There was impairment of contract rights vested in your petitioner; and denial of due process of law for protection of said vested property rights, and denial to your petitioner of equal protection and denial of equal application of law. Petition for rehearing was denied by the Supreme Court of Illinois on November 11, 1943. Upon an application to this Court for an extension of time to file this petition, an order was entered in this Court, extending the time. Timely application for review by this Court is made by filing this petition for rehearing. This petition is presented in accordance with Section 237(b) of the Judicial Code as amended, and Rule 38 of this Court as amended.

Indiana ex rel Anderson v. *Brand*, 303 U.S . 95.

Upon each appeal (1934 and 1943), your petitioner Winston contended before the Supreme Court of Illinois, that the law to govern this case was thoroughly settled by Constitution and by prior statutes and earlier decisions of the Supreme Court of Illinois. On the first appeal (No. 22412 taken by the State's Attorney of Cook County) the Supreme Court of Illinois said:

> "A construction of the Constitution is involved, and so, regardless of argument pertaining to other elements of jurisdiction, this Court has jurisdiction, and the motion to transfer will be denied."

That Court at that time (October 24, 1934) reversed the dismissal order that had been entered against the State's Attorney suit by the Circuit Court of Cook County, and remanded the case to that Court. There being no final order at that date, this record could not then be brought this Court for review. *Georgia Ry. and Power Co. v. Decatur,* 262 U.S. 432. Later (after remandment and further proceeding) the present appeal was taken in the year 1943 to the Supreme Court of Illinois, by your petitioner. This is similar to the following decisions, where this Court took jurisdiction and gave relief, under like circumstances.

Cases mentioned by respondents are not in point.

To defeat the jurisdiction of this court to review this record now at bar, respondents rely upon the case of *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444. In that case at page 450, this Court quoted Section 237 of the Judicial Code as amended February 17, 1922, reading as follows:

> "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest court of a state, in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

With reference to that amended statute, the opinion by

Your Honors in the *Tidal Oil Company* case, at page 455, made the following ruling:

> "It was the purpose of the Act of 1922 to change the rule established by this formidable array of authorities as to the class of cases therein described. The question in such cases could not well be raised until the handing down of the opinion indicating that the objectionable judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the petition for rehearing without opinion."

The petitions for rehearing (Tr. 81-158) in the instant case were denied by the Supreme Court of Illinois without any written opinion thereon (Tr. 159).

Counsel for respondents probably overlooked the fact that in the *Tidal Oil Company* case, there had not been any construction of the state statutes or constitution by the state courts, and consequently no reliance thereon by the parties in the legal acts and documents there under review, and consequently there had been no departure by the state courts from a settled construction of the state law established by state decision upon state statutes or constitution prior to the time of the acts upon which the rights were claimed to be based in the *Tidal Oil Company* case.

The absence of any prior settled law likewise was the controlling fact in the case of *Toole County Irrigation District* v. *Moody*, 125 Fed. (2d) 498, upon which also respondents place reliance. The opinion in that case at page 500 reads as follows:

> "At the time the bonds here involved were issued (1921 and 1922), the Supreme Court of Montana had not decided whether bonds issued under chapter 146 constitute general obligations of the issuing district

or merely a charge against the lands within such district."

In that *Toole County* case there was no decision by the court from which a departure could be made by Court action. The contrary is true in the case at bar. There were more than sixty years of Illinois court decisions interpreting the Constitution and the statutes of Illinois pretianing to the subject matter *before the contract at bar was made between the petitioner and Cook County.*

That fact governed that case: and that fact completely distinguishes that line of cases from the record and situation now at Bar.

Departure from Established Law.

The petition is here with the record wherein the Supreme Court of Illinois, by its two opinions and ruling in this case, for the first time, makes departure from the rulings by itself and the Appellate Court of Illinois, as to the established meaning and effect of the constitution and statutes of Illinois, as disclosed by many decisions over a period of more than sixty years, prior to the time that the legislative act and contract by the County Board of Cook County was enacted and the contract now at bar was entered into with this petitioner in the year 1931.

The decisions by the Supreme and Appellate Courts of Illinois during said sixty years, before this contract was made, necessarily became an established part of the statute and constitution of the State of Illinois, many decades before this contract was entered into by petitioner and Cook County, relying thereon. During all of these years and to this date, the legislature of Illinois did not change that meaning and construction of said statutes of the State

of Illinois. The sudden departure by the Supreme Court of Illinois, in the instant case, is not a construction or interpretation of the statute and the constitution, but is in fact nothing more or less than outright judicial legislaton, and an outright seizure by the court of legislative power belonging to another branch of the government of the State of Illinois, and is arbitrary denial of federal constitutional rights vested in your petitioner as herein stated.

These Cases Support Federal Jurisdiction.

In the case of *State of Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95 the suit was

> "Mandamus by the State of Indiana, on the relation of Dorothy Anderson, to compel Harry Brand, Trustee of Chester School Township of Wabash County, Ind., to continue relatrix in employment as a public school teacher. To review a Judgment, 5 N. E. 2d. 531, 110 A. L. R. 778, affirming a judgment sustaining a demurrer to the complaint, relatrix brings certiorari. Reversed and remanded."

In that case at Page 105, Your Honors stated:

> "Until its decision in the present case the Supreme Court of the State had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the act was contractual."

In that case Your Honors took jurisdiction on petition for writ of certiorari to the State Supreme Court, and Your Honors decided the case, and reversed the ruling made by the Supreme Court of Indiana.

Coombes v. *Getz*, 285 U. S. 434 at 441 52 S. Ct. 435 at 436: is another like case where you took jurisdiction and reversed the State court rulings as departures:

"The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this court; *but that is not so where the contract clause ofthe Federal Constitution is is involved.* In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been affected. *Scott* v. *McNeal,* 154 U. S. 34, 45, 14 S. Ct. 1108, 38 L. Ed. 896; *Mobile & Ohio Railroad* v. *Tennessee,* 153 U. S. 486, 492, etc., 14 S. Ct. 968, 38 L. Ed. 793; *Stearns* v. *Minnesota,* 179 U. S. 223, 232, 233, 21 S. Ct. 73, 45 L. Ed. 162; *Louisiana Ry. & Nav. Co.* v. *New Orleans,* 235 U. S. 164, 170, 35 S. Ct. 62, 59 L. Ed. 175; *Huntington* v. *Attrill,* 146 U. S. 657, 684, 13 S. Ct. 224, 36 L. Ed. 1123; *N. O. Waterworks* v. *La. Sugar Co.,* 125 U. S. 18, 38, 8 S. Ct. 741, 31 L. Ed. 607; *Bridge Proprietors* v. *Hoboken Co.,* 1 Wall. 116, 144, 17 L. Ed. 571; *Jefferson Branch Bank* v. *Skelly,* 1 Black, 436, 443, 17 L. Ed. 173.

"In substance, the contention of respondent here is that the reserved power provision, read into the contract as one of its terms, authorizes an extinction by repeal of the creditor's cause of action, unless previously reduced to final judgment."

Likewise you took jurisdiction in the case of *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 53 S. Ct. (1932) 145 at 149:

"* * * The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and

another thing for others. *This latter objection the petitioner could not make in advance of the event.*"

And again you gave relief to petitioner in the case of *West Chicago Street Ry. Co.* v. *Illinois ex rel Chicago*, 201 U. S. 506 at 519-520:

'We come now to consider the questions arising on the record and discussed at the bar.

"1. The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation,—although the opinion of the state court does not expressly refer to the Constitution of the United States,—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in *Chicago, B. & Q. R. Co.* v. *People* (*recently decided*) 200 U. S. 561, 596, 20 Sup. Ct. Rep. 341."

And again this Court enforced the Constitution *Home T. & T. Co.* v. *Los Angeles*, 227 U. S. 278 at 290 and 291:

"In *Ex Parte Virginia*, 100 U. S. 339, L. ed. 676, 3 Am. Crim. Rep. 547, the case was this: A judge of a

Virginia county court was indicted under the civil rights act for excluding negroes from juries on account of their race, color, etc. The accused applied to this court for a writ of habeas corpus and a writ of certorari to bring up the record, and a like petition was presented on behalf of the state of Virginia, and both applications were disposed of at the same time. The first issue to be determined was the meaning of the 14th Amendment. The ruling in *Virginia* v. *Rives* was reiterated, the court saying:

" 'They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. *Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.* This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it.'

"Answering the claim that there was no power to punish a state judge for judicial action, and therefore that the charge made was not within the 14th Amendment, it was said that the duty concerning the summoning of jurors upon which the charge of discrimination was predicated was not a judicial but merely a ministerial one. It was, however, pointed out that even if this was not the case, as the state statute gave no power to make the discrimination, it was therefore such an abuse of state power as to cause the act complained of to be not within the state judicial authority,

but a mere abuse thereof; and that it was 'idle' under such circumstances to say that the offense was not within the Amendment (p. 348).

"In *Neal* v. *Delaware,* 103 U. S. 370, 26 L. ed. 567, a discriminating enforcement in practice of laws which were in their terms undiscriminating was again held to be within the Amendment, the language which we have quoted from *Ex parte Virginia* being reiterated.

"In *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, the enforcement of certain city ordinances was prohibited on the ground that they were within the reach of the 14th Amendment. The court, reiterating the doctrine of *Virginia* v. *Rives* and *Ex Parte Virginia,* held that this conclusion was sustained from a two fold point of view,—first, the terms of the ordinances, and second, in any event from the discriminatory manner in which the ordinances were applied by the officers."

And in your latest ruling on April 24, 1944 your Honors affirm the foregoing: *Great Northern Life Ins. Co.* v. *Read,* 64 S. Ct. 873 at 878:

"It may be well to add that the construction given the Oklahoma statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by the state courts. *Chandler* v. *Dix,* 194 U. S. 590, 592, 24 S. Ct. 766, 48 L. Ed. 1129; *Smith* v. *Reeves,* 178 U. S. 436, 445, 20 S. Ct. 919, 922, 44 L. Ed. 1140."

An Act of State Attempted by Illinois Courts.

If State Courts are not forbidden by the Constitution to do what Illinois Courts have done in this record, then it follows that any State Court may dispossess and destroy the contract and property rights of any person as against any municipality or State. That will be true no matter what has been the prior decision, or the prior statute, or

the prior State Constitution; and no matter how long may be the course of action of the municipality or State upon which the person relied, as basis for his contract and franchise and property right vested in such person, before the new decision shall announce the departure and new statement of law. In short if this record is allowed to stand we are not merely on the road, but we have already arrived at the time when the European Doctrine of "Act of State" has been fully adopted in this country. Under this new theory made effective by the rulings in this record, the citizen is no longer citizen under the Constitution. He is *subject* to the *will of current government.* The shield and protection of the Constitution are removed.

Prayer for Relief.

Your petitioner submits that he did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court and Supreme Court of Illinois impaired his contract and took away his property right by arbitrary and capricious decision. That action was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays the allowance of writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

Weightstill Woods,
Counsel for Petitioner.